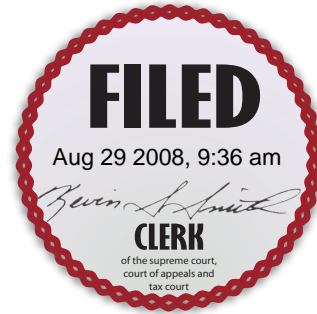


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

LOUIS W. DENNEY
Muncie, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

GEORGE P. SHERMAN
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

EARL EUGENE JACKSON,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 18A02-0801-CR-115

APPEAL FROM THE DELAWARE CIRCUIT COURT
The Honorable Robert L. Barnet, Judge
Cause No. 18C03-0602-FB-7

August 29, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Following a jury trial, Appellant-Defendant Earl Jackson appeals his conviction for Attempted Dealing in Methamphetamine as a Class B felony;¹ Maintaining a Common Nuisance, a Class D felony;² and Possession of Chemical Reagents or Precursors with Intent to Manufacture, a Class D felony,³ for which he received an aggregate seven-year sentence in the Department of Correction. Upon appeal, Jackson claims that certain evidence used against him was procured in violation of his Fourth Amendment rights. We affirm.

FACTS AND PROCEDURAL HISTORY

On February 13, 2006, Jackson and Billie Myers leased from Everett Bilbrey a residence located at 501 South Mound Street, Apartment C, in Muncie. Apartment C was an upstairs apartment which was accessed by an outside stairway. The furnished apartment had been cleaned prior to the lease.

On February 22, 2006, at approximately 10:30 a.m., Investigator Jeff Stanley of the Delaware County Sheriff's Office Drug Task Force went to 501 South Mound Street to serve an arrest warrant on Jackson. Upon arriving at the residence, Officer Stanley and other SWAT Team members knocked on the door to Apartment C. When there was no response, Officer Stanley contacted Bilbrey. Bilbrey was unable to obtain a key, so he provided a ladder to gain access to one of Apartment C's upstairs windows. Certain members of the SWAT Team opened the window but did not go inside the apartment. At

¹ Ind. Code §§ 35-48-4-1(a)(1); 35-41-5-1 (2005).

² Ind. Code § 35-48-4-13 (2005).

³ Ind. Code § 35-48-4-14.5(e) (2005).

that point Jackson came to the door of the apartment and opened the door. SWAT Team members took him into custody on the landing at the entrance to the apartment. Officer Stanley and SWAT Team members then entered the apartment, found Myers, and took her into custody upon determining that she had outstanding warrants. Upon entering the apartment, Officer Stanley observed a container of muriatic acid and another container of acetone, both of which were lying on the floor in the living room. Officer Stanley recognized these substances as potential precursors for the manufacture of methamphetamine.

Based upon the presence of the muriatic acid and acetone, Officer Stanley prepared an affidavit requesting a search warrant for the apartment. Upon receiving the warrant and executing a search, Officer Stanley and other investigators found additional items used in the manufacture of methamphetamine, including the following: three glass jars containing liquid substances and bottles of Liquid Heet in the insulation behind a door in the bedroom closet; a glass beaker holding several coffee filters submerged in a reddish-brown liquid; aluminum foil; two plastic baggies containing a brown powdery substance inside a cigarette pack; a small set of scales containing a white powdery residue; a glass pipe containing aluminum foil in one end; an empty bottle of Red Devil Lye in the kitchen trash can; and a container of Coleman fuel in a cabinet by the kitchen sink. In the garbage outside the apartment, authorities recovered an empty can of acetone, an empty bottle of muriatic acid, an empty bottle of hydrogen peroxide, and a coil of aluminum tubing. Subsequent tests revealed that the brown powdery substance and the reddish-brown liquid tested positive for methamphetamine.

On February 24, 2006, the State charged Jackson with attempted dealing in methamphetamine (Count 1), unlawful possession or use of a legend drug (Counts 2 and 3), maintaining a common nuisance (Count 4), and possession of chemical reagents or precursors with intent to manufacture (Count 5). The State subsequently dismissed Counts 2 and 3. Prior to trial, Jackson filed a motion to suppress all physical evidence procured as a result of the officers' initial entry into the apartment and pursuant to the search warrant, which the trial court denied. Following trial, the jury found Jackson guilty as charged. The trial court subsequently entered judgment of conviction on all three counts and, following a January 14, 2008 sentencing hearing, sentenced Jackson to concurrent sentences of seven years executed for Count 1, one year executed for Count 4, and one year executed for Count 5. This appeal follows.

DISCUSSION AND DECISION

Upon appeal, Jackson claims that certain evidence discovered pursuant to the officers' initial entry into his apartment and the search warrant should have been suppressed and excluded at trial because it was procured in violation of his Fourth Amendment rights.⁴ Our standard of review of rulings on the admissibility of evidence is the same whether the challenge is made by a pre-trial motion to suppress or by a trial objection. *Ackerman v. State*, 774 N.E.2d 970, 974 (Ind. Ct. App. 2002), *trans. denied*. We look for substantial evidence of probative value to support the trial court's decision.

⁴ Although Jackson refers in his brief to Article 1, Section 11 of the Indiana Constitution, he does not cite a separate argument specifically treating and analyzing a claim under the Indiana Constitution distinct from his Fourth Amendment claim. Accordingly, we resolve his claim on the basis of federal constitutional doctrine only. *See Myers v. State*, 839 N.E.2d 1154, 1158 (Ind. 2005).

Swanson v. State, 730 N.E.2d 205, 209 (Ind. Ct. App. 2000), *trans. denied*. We consider the evidence most favorable to the court's decision and any uncontradicted evidence to the contrary. *Id.*

Jackson challenges the validity of the search warrant by pointing to what he claims are factual inconsistencies between the affidavit for the search warrant and the testimony at the suppression hearing and trial. The Supreme Court has observed that a false affidavit generally renders a search warrant invalid and the fruits of any search made pursuant to it are generally suppressible. *Mason v. State*, 532 N.E.2d 1169, 1170 (Ind. 1989). Jackson claims that the affidavit for the search warrant misrepresented the facts by stating that (1) he was arrested inside the apartment and (2) the muriatic acid and acetone were discovered as a result of a protective sweep for others inside the apartment.⁵

Before addressing the alleged factual inconsistencies, we find it necessary to review the law governing protective sweeps. There are two situations in which a warrantless search of a home during an arrest is constitutionally permissible. *Hannibal v. State*, 804 N.E.2d 206, 209 (Ind. Ct. App. 2004). A warrantless search is proper when (1) it is conducted in rooms immediately adjoining the area of the arrest, regardless of reasonable suspicion, or (2) when the police have reasonable suspicion that rooms not immediately adjacent to the area of the arrest contain a hidden person who might jeopardize officer safety. *Id.* (citing *State v. Estep*, 753 N.E.2d 22, 26 (Ind. Ct. App. 2001)). Reasonable suspicion is satisfied if the known facts are such that a person of

⁵ Jackson further claims that the affidavit included the misstatement that Bilbrey had assisted authorities with entering the apartment. Jackson's claim on this point is refuted by Bilbrey's testimony, which established that he had provided a ladder for authorities to use to access the apartment.

reasonable caution would believe the action taken was appropriate and is judged on a case-by-case basis and against an objective standard. *Id.*

Jackson points to his own testimony at the suppression hearing in arguing that the evidence demonstrates, contrary to Officer Stanley's statement in the affidavit, that both he and Myers were outside the apartment before officers entered and that the officers' purpose in entering could not have been to "clear" the apartment as alleged. App. p. 212. Contrary to Jackson's testimony, the evidence most favorable to the judgment demonstrates that Myers was arrested inside the apartment after Jackson was arrested. Jackson also argues that Officer Stanley's trial testimony that Jackson was arrested on the landing of the stairway at the entrance to the apartment was inconsistent with his statement in the affidavit that Jackson was arrested inside the apartment. Regardless of whether Jackson was arrested at the entrance to or inside his apartment, however, the known facts in the instant record establish the necessary reasonable suspicion to justify a protective sweep beyond the rooms immediately adjoining the area of the arrest.⁶

Law enforcement authorities arrested Jackson pursuant to an active warrant for his arrest for Failure to Comply with Community Corrections. At the time of the arrest, authorities were aware that Jackson had a previous drug-related arrest, that he was rumored to be teaching others how to manufacture methamphetamine, and that he was starting a methamphetamine lab at the Mound Street address. Perhaps most significantly, the apartment at this address was leased to two people, Jackson and Myers. Officer

⁶ It appears that the entrance to the apartment leads to the kitchen, that the living room is located to the left of the kitchen, and the master bedroom is located to the right of the kitchen.

Stanley's testimony that Myers was subsequently arrested inside the apartment indicates that she was not accounted for at the time of Jackson's arrest. Not incidentally, Jackson was arrested on the stairway immediately adjoining the open doorway to his apartment. These known facts are adequate to establish reasonable suspicion at the time of Jackson's arrest that others might be present who could jeopardize officer safety. As for the existence of facts establishing that Jackson was arrested outside his apartment, the fact that officers are outside an apartment does not negate the need for a protective sweep for dangerous persons under circumstances otherwise warranting one. *See Hannibal*, 804 N.E.2d at 210. In this case, clearly the officers could have been at risk of injury by someone inside the open door of the apartment.

Having found Jackson's challenge to the evidence leading to his conviction is without merit, we affirm the judgment of the trial court.

The judgment of the trial court is affirmed.

RILEY, J., and BAILEY, J., concur.